

1972

State of Utah v. James Cummings : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Utah v. Cummings*, No. 12487 (Utah Supreme Court, 1972).
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IN 1911
SUPREME COURT

STATE OF UTAH

STATE OF UTAH

JAMES CUMMINGS

BRIEF OF

**APPEAL FROM A
THE THIRD JUDGE
AND FOR SALT LAKE
THE HONORABLE
PRESIDING.**

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

JAMES CUMMINGS,

Defendant-Appellant.

Case No.

12487

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal by the defendant-appellant, James Cummings, from a conviction for robbery.

DISPOSITION IN LOWER COURT

The appellant was convicted pursuant to Utah Code Ann. § 76-51-1 (1953) at a jury trial in the District Court of the Third Judicial District, the Honorable Gordon R. Hall, presiding. The appellant was sentenced to an indeterminate term in the Utah State Prison as provided by law for the crime of robbery.

RELIEF SOUGHT ON APPEAL

The respondent submits that the judgment of the district court should be affirmed and that the appellant should be retained in custody at the Utah State Prison.

STATEMENT OF FACTS

The statement of facts set forth in the appellant's brief is accurate and a further statement will not be made by the respondent except as necessary in presenting its argument.

ARGUMENT

POINT I.

A CLAIMED VIOLATION OF DUE PROCESS OF LAW IN THE CONDUCT OF A LINEUP DEPENDS UPON THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THE LINEUP IDENTIFICATION. WHERE THE EYEWITNESS HAD AN INDEPENDENT BASIS FOR MAKING THE IDENTIFICATION, THE DEFENDANT-APPELLANT WAS NOT DENIED DUE PROCESS OF LAW EVEN THOUGH HE WAS THE ONLY SUSPECT IN THE LINEUP WITH SCARS ON HIS ARMS.

The appellant contends that the lineup at which he was identified was basically unfair and implanted in the mind of the state's witness that the defendant was the

same person as the suspect who robbed the Bonus Station at Ninth South and West Temple in Salt Lake City. To support his contention that the lineup procedures were inherently suggestive, the appellant cites the testimony of his attorney, Jay Edmonds, relating to the composition of the lineup. It should be noted, however, that Mr. Edmonds was permitted to examine the lineup before the witnesses were admitted to the show-up room. He was given the opportunity to raise objections as to the composition or any part of the lineup, but he declined to do so (T. 20-21).

From the testimony of the identifying witness, Bryce Nelson, it is clear that Nelson's identification of the defendant was confident and unequivocal and did not depend upon the allegedly suggestive identification procedure. At page 7 of his brief, the appellant takes certain liberties with his interpretation of the transcript and would mislead the court by extracting language from the transcript and labeling it as Nelson's inability to recognize the defendant as the suspect. In actuality, the question to which the witness responded had reference to the individual who had occupied space number one in the lineup and not the defendant who had occupied space number three. When asked if he recognized [Number One], Nelson responded, "I can't remember" (T. 10). Nelson testified that the identification was made on the basis of the general appearance of the suspect (T. 7) which was a product of the witness' observation of the suspect at the time of the robbery.

The standard for determining the illegality of an identification elicited during a pretrial confrontation is set forth in *United States v. Wade*, 388 U. S. 218 (1967), and *Stovall v. Denno*, 388 U. S. 293 (1967). In these cases the United States Supreme Court observed that a pretrial confrontation will constitute a ground for reversal of the conviction where, depending upon the totality of the circumstances surrounding the confrontation, it “. . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that defendant was denied due process of law.” *Stovall, supra*, at 302.

The language in both *Wade* and *Stovall* indicates that, in considering the totality of the circumstances surrounding any pretrial identification, the presence of certain other facts in the totality may serve either to justify an improperly conducted identification or to avoid the presumption that the defendant has been prejudiced by the allegedly suggestive confrontation. For example, where factors external to the confrontation itself tend to prove that the witness's identification was accurate and hence not prejudicial to the defendant, courts have upheld the use of identification procedures which arguably could be regarded as suggestive. See, e.g., *United States ex rel. Rutherford v. Deegan*, 406 F. 2d 217 (2d Cir. 1969); *Cline v. United States*, 395 F. 2d 138 (8th Cir. 1968); *Hanks v. United States*, 388 F. 2d 171 (10th Cir. 1968).

In the *Rutherford* case, the Second Circuit Court of Appeals evaluated the accuracy of an identification resulting from an allegedly suggestive pretrial confronta-

tion. The witness whose cleaning establishment had been robbed was called to the police station to examine a suspect. At the station house the witness viewed the defendant, a Negro, in a room with several white detectives by means of a one-way mirror, and immediately identified him as the criminal. Holding that the identification of the defendant was probably accurate, regardless of the prejudicial nature of the confrontation, Judge Medina placed great emphasis on the fact that the witness had for some five minutes watched the two men who had committed the robbery, making a deliberate attempt to study the face of the man who rifled her pocketbook.

This approach to the totality test adopted by the Second Circuit has support in two Supreme Court decisions since *Stovall*. In *Simmons v. United States*, 390 U. S. 377 (1968), the Court validated a photographic showup relying, at least in part, upon its belief that there was little chance that a misidentification had taken place because the witness had an excellent opportunity to observe the suspects during the robbery. In *Biggers v. Tennessee*, 390 U. S. 404 (1968), the Court, splitting four-to-four, affirmed per curiam a conviction resting upon a showup identification. Significantly, Justice Douglas in his dissent considered factors similar to those weighed by the courts in both *Rutherford* and *Simmons*, although he reasoned that, on the facts of the case, the accuracy of the identification was in doubt and, therefore, the confrontation violated due process.

In *Thurman v. State*, 262 N. E. 2d 635 (Ind. 1970), the Indiana Supreme Court observed that the resolution of whether identification procedures are unduly suggestive or conducive to irreparable mistaken identity is best accomplished by a hearing in the trial court, for it is there that an exploration of the circumstances surrounding the confrontation can be accomplished. On this basis, the court upheld the identification and conviction of a Negro defendant who had been the only individual in an all Negro lineup with an "Afro" haircut where it was shown that the witnesses had ample opportunity to observe the defendant during the commission of the crime. Parenthetically it should be noted that each of the witnesses had earlier told police investigators that the suspect wore his hair in the "Afro" style.

The facts of the instant case demonstrate that a careful examination of the totality of the circumstances surrounding the identification yields the conclusion that Mr. Nelson identified the defendant without depending upon the allegedly suggestive circumstances surrounding the identification procedure. This is not a case where the witness's identification of the suspect is based upon a fleeting glance of the suspect as in *People v. Caruso*, 68 Cal. 2d 183, 436 P. 2d 336 (1968). On the contrary, Nelson was the victim of the crime. He was held at gunpoint by the suspect in an area of excellent lighting, and as the witnesses in *Rutherford*, *Simmons*, *Biggers*, and *Thurman*, Nelson had an ample opportunity to observe the defendant during the commission of the crime.

The respondent does not seriously contest the appellant's contention that situations may arise in which a suspect is the only individual in a police lineup with distinguishing features or characteristics. Nor does the respondent argue that such features or characteristics may have some suggestive impact upon the witnesses who are present for purposes of identification. For example, in *State v. Ervin*, 22 Utah 2d 216, 451 P. 2d 372 (1969), this Court decried the manipulation of police lineups so as to be unduly suggestive of identification. However, implicit in this statement is the Utah Supreme Court's recognition that the element of suggestibility cannot be removed completely from lineup procedures. Indeed, the Court observed that the lineup procedure should not be "so laden with difficulties nor burdened with super-cautions as to make lineups impractical as a method of identifying the guilty." 22 Utah 2d at 221.

Where the eyewitness has an independent basis for the in-court identification of the defendant, the United States Supreme Court has enunciated the rule that such identification is admissible even though the pre-trial identification was violative of due process. *Wong Sun v. United States*, 371 U. S. 471 (1963). With this in mind, the Court vacated the conviction of the petitioner in *Gilbert v. California*, 388 U. S. 263, 272-273 (1967) to permit the California Supreme Court to determine whether an independent basis would support the identification. See also, *Clemons v. United States*, 408 F. 2d 1230, 1237 (D. C. Cir. 1968).

Two recent decisions by the Utah Supreme Court further support the respondent's position that even granting that the lineup procedures suggested which individual the witness would identify, the identification is not tainted where there exists an independent basis for the in-court identification. In *State v. Vasquez*, 22 Utah 2d 277, 451 P. 2d 786 (1969), the in-court identification of the defendant was permitted where the witness had an independent basis for making the identification even though the defendant had been denied counsel at the lineup. Similarly, this Court rejected the appellant's argument in *State v. Jordan*, 26 Utah 2d 240, 487 P. 2d 1281 (1971), holding that any irregularities in the positive identification of the defendant by eyewitnesses could not have resulted in any substantial prejudice to the defendant and did not deny him due process where the eyewitnesses had other bases for making the identification.

CONCLUSION

The respondent respectfully submits that the lineup was representative and conducted in a manner which would not unduly suggest the identity of the suspect. The respondent further submits that even granting that the identification procedure was suggestive, the resulting identification was not tainted since the identifying witness had an independent basis upon which to form his in-court identification and that such identification was a genuine product of the knowledge and recollection of the witness.

The respondent therefore prays this Honorable Court to affirm the conviction of the defendant for the crime of robbery.

Respectfully submitted,

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